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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

16-cr-809 (VM)

5 RANDY TORRES,  
6 WALSTON OWEN, and  
7 CHARLES VENTURA,

Defendants.

Conference

8 -----x

9 New York, N.Y.  
10 January 10, 2020  
11 9:25 a.m.

12 Before:

13 HON. VICTOR MARRERO

14 District Judge

15 APPEARANCES

16 GEOFFREY S. BERMAN  
17 United States Attorney for the  
18 Southern District of New York  
19 BY: JESSICA FENDER, ESQ.  
20 Assistant United States Attorney

21 LAW OFFICE OF SAM A. SCHMIDT  
22 Attorneys for Defendant Torres  
23 BY: SAM A. SCHMIDT, ESQ.

24 DONALDSON CHILLIEST & McDANIEL LLP  
25 Attorneys for Defendant Owen  
26 BY: XAVIER R. DONALDSON, ESQ.  
-and-

27 LAW OFFICE OF ALAIN V. MASSENA  
28 Attorneys for Defendant Owen  
29 BY: ALAIN V. MASSENA, ESQ.

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1 THE COURT: This is a proceeding in the matter of  
2 United States v. Torres and others, docket no. 16-cr-0809.  
3 Counsel, please enter your appearances for the record.

4 MS. FENDER: Good morning, your Honor. Jessica Fender  
5 on behalf of the government.

6 MR. DONALDSON: Your Honor, for Mr. Owen, Xavier R.  
7 Donaldson. Good morning.

8 MR. MASSENA: Alain Massena, also for Mr. Owen. Good  
9 morning, your Honor.

10 MR. SCHMIDT: Good morning, your Honor. Sam Schmidt  
11 for Randy Torres. I waive Mr. Torres' presence for today.  
12 This is a matter dealing with Mr. Owen and not Mr. Torres.

13 THE COURT: Thank you.

14 The Court scheduled this conference following receipt  
15 of a letter from Mr. Owen's counsel dated January 7, 2020  
16 bringing to the Court's attention the potential conflict that  
17 counsel may have relating to his representation of another  
18 defendant in a matter that potentially may raise some issues  
19 concerning Mr. Donaldson's representation of Mr. Owen in this  
20 proceeding.

21 Let me first ask the government whether the government  
22 has received and reviewed the copy, or a copy of  
23 Mr. Donaldson's letter?

24 MS. FENDER: We have, your Honor. We had spoken with  
25 Mr. Donaldson about this issue prior to his sending the letter.

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1 THE COURT: Mr. Donaldson, did you wish to address the  
2 questions that you raise and indicate whether you believe there  
3 is a conflict that needs to be resolved?

4 MR. DONALDSON: Judge, yes. I will try to follow some  
5 type of procedure here, but I wanted to bring it to the Court's  
6 attention, because I think that there may be some issues that  
7 need to be resolved and I wanted to make sure we did it early  
8 enough to get it done prior to the beginning of trial.

9 I will start with context. I did represent a  
10 potential witness of the government back in, I think beginning  
11 of 2007 and 2008. He was arrested on a, I think, unrelated, I  
12 think the government thinks as well, unrelated state firearm  
13 charge in Bronx County. I represented that young man from  
14 inception to the disposition of his case, resulting in his  
15 conviction for that firearm.

16 His name was brought to my attention sometime last  
17 year by the government. I will be honest; initially I didn't  
18 recognize the name. It sounded familiar to me. I then thought  
19 about it, I think maybe a week or so. I did some research into  
20 it and I realized, yes, I know this young man. I informed the  
21 government of that situation.

22 We discussed at that point, I think rather thoroughly,  
23 we vetted it out rather thoroughly. I spoke to Mr. Owen about  
24 it as soon as I found out about it a couple months ago. We did  
25 not think that there was an issue. Mr. Owen didn't have an

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1 issue with it, with my representation of that former client and  
2 my continued representation of him.

3           However, after reviewing some of the materials  
4 subsequently provided by the government and reviewing some  
5 other materials provided by the government and in preparation  
6 for trial, it's my belief that there might be the smallest  
7 possibility that I may have to cross-examine this person if he  
8 is called as a witness. If that would be the case, it's my  
9 opinion that I think Mr. Owen at least needs to be aware that I  
10 did in fact represent this person and now I may have to  
11 cross-examine that person. I think Mr. Owen needs to  
12 understand that that possibility may occur if he testifies.

13           But another possibility comes up is that if someone  
14 else testifies about what this potential witness told them, and  
15 even if the witness doesn't testify, for example, if a  
16 potential witness does not testify but the government puts on a  
17 witness that testifies as to what my former client said as a  
18 co-conspirator statement, then I would have to cross-examine  
19 that witness based upon what my former client says, and I think  
20 the law allows me to cross-examine on that person's credibility  
21 that he told him whatever he told him.

22           So either way, it may be a situation where I'll be  
23 cross-examining somebody related to what my former client may  
24 have said, to at least give the jury some idea about my former  
25 client's credibility.

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1           So I think because of those possibilities, I think  
2           they're rather small, based on my conversations with the  
3           government, but I have to prepare for even the smallest  
4           possibility, and so I felt it appropriate to bring this to the  
5           Court's attention.

6           I don't believe that my client has an issue with me  
7           doing that. But I think he needs to be aware of the fact that  
8           that may happen, that I may be required to cross-examine a  
9           former client, and whether he is in fact comfortable with me  
10          doing that.

11          THE COURT: Thank you.

12          Ms. Fender.

13          MS. FENDER: Yes, your Honor. Everything that  
14          Mr. Donaldson has said is exactly right, including the fact  
15          that we agreed that there's no conflict here to resolve, but we  
16          think that Mr. Donaldson is appropriately taking a very  
17          cautious view and wanting to place this on the record, which we  
18          agree with.

19          So just to clarify a few things, your Honor, we did  
20          address this issue when Mr. Donaldson brought it to our  
21          attention in, I think that was August of 2019. At that time I  
22          actually reached out to and also spoke with the counsel who  
23          currently represents the former client, to make sure I fully  
24          understood from that perspective as well what my potential  
25          conflict might be. We are, I think, confident, under -- the

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1 governing rule here, your Honor, is Rule 1.9, and under both  
2 the model ABA code and the New York State application of that,  
3 there is no conflict here that we see. Specifically, there is  
4 only a conflict where there is representation of a former  
5 client where there's a same or substantially related matter in  
6 which the former client's interests are materially adverse.  
7 And having spoken with Mr. Donaldson at some length and spoken  
8 with the current counsel for the former client, we have no  
9 understanding that there is a same or substantially related  
10 matter here. Mr. Donaldson's representation in 2008 was  
11 something that, by everyone's current knowledge, is completely  
12 different, and hasn't given Mr. Donaldson's any inside  
13 information that would make it inappropriate here for him to  
14 continue with his representation of Mr. Owen.

15 So we are confident that there is no conflict, but we  
16 agree that it's prudent for us to make sure that this is all on  
17 the record, that the steps that have been undertaken are  
18 clearly fleshed out, and that Mr. Owen is apprised of the  
19 potential, however slight -- and we agree that it's quite  
20 slight -- that the former client would testify at this trial.

21 THE COURT: In light of these representations, let me  
22 ask Mr. Owen to please rise.

23 Please rise.

24 Mr. Owen, your counsel, Mr. Donaldson, has brought to  
25 the Court's attention and to the government's that he at one

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1 point represented a client in, he says, a matter dating back to  
2 2007, and that there is some possibility -- the government says  
3 it may be remote -- that that former client of Mr. Donaldson  
4 may be called to testify in this proceeding involving charges  
5 against you, and that, if that occurs, Mr. Donaldson may feel  
6 it necessary to cross-examine that former client. In those  
7 situations where an attorney is representing a former client,  
8 there's always the prospect, sometimes very -- most of the  
9 times very remote -- that the cross-examination may not be as  
10 forceful and vigorous as representing a witness who has not  
11 been a client.

12           However, under the rules, which the government has  
13 just indicated, the ethical rules that apply, the issue arises  
14 when there is some relationship between the matters that  
15 counsel represented a former client in prior and those that are  
16 involved in the present proceedings. The government has  
17 indicated, and I concur, that there is no clear connection  
18 between Mr. Donaldson's representation of that former client in  
19 2007 and the matters that are up for trial in your case.

20           So, for these reasons, Mr. Donaldson and the  
21 government wish to record that this matter was brought to the  
22 Court's attention and that you are aware of it and that you do  
23 not have any objection to Mr. Donaldson's continuing to  
24 represent you in this matter, even if he may be called upon to  
25 cross-examine this former client relating to the charges

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1 against you.

2 Do you understand all of what I just said?

3 THE DEFENDANT: Yes.

4 THE COURT: And with that understanding, do you have  
5 any objection to Mr. Donaldson continuing to represent you in  
6 this matter?

7 THE DEFENDANT: No.

8 THE COURT: All right. Thank you.

9 Ms. Fender, is there anything else?

10 MS. FENDER: Not from the government, your Honor.

11 THE COURT: Mr. Donaldson?

12 MR. DONALDSON: Yes. There is just one other  
13 scheduling issue I wanted to speak to the Court about. We have  
14 a trial scheduled for February 3rd, 2020. That date was set, I  
15 believe, via telephone conference some time ago, I believe in  
16 December or November. I've forgotten what day it was. I was  
17 not actually on that phone conference. I told the government  
18 and co-counsel that February 3rd was not a great day for me,  
19 that I would be asking that we start February 4th. Why?  
20 Because my schedule -- I'm not here February 3rd. I can change  
21 it, I think, but I told the government and co-counsel that I  
22 would probably ask the Court for February 4th if I couldn't  
23 change it for February 3rd. I've been trying, but it's been  
24 difficult.

25 I told the government yesterday that I would be asking



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1 the Court, if the Court were inclined to allow us to start  
2 February 4th in the morning rather than February 3rd in the  
3 morning, told the government I would make an application this  
4 morning. I believe the government said they would be objecting  
5 to it, for -- for odd reasons. But they'll put that on, if  
6 they want to put that on the record.

7 I don't know how much of a difference it will make,  
8 but that would be my request and I'm making that request now,  
9 that we start February 4th rather than February 3rd. I've  
10 spoken to my colleagues. They are fine with it. I think the  
11 government is, as of last night -- may not be fine with it.

12 THE COURT: All right. Thank you.

13 Ms. Fender, do you want to address that request?

14 MS. FENDER: Just very briefly, your Honor. As I told  
15 Mr. Donaldson, we certainly appreciate that he has travel plans  
16 and we want to be mindful of that. The issue for us is just,  
17 as your Honor knows, this trial has the potential to be quite  
18 massive. We've been working very hard it with defense counsel  
19 and I'm happy to report that we've made significant progress on  
20 a number of stipulations. But there are a few that, as we  
21 highlighted early on for the defense, address a number of  
22 witnesses that are very, in our view, ministerial, things like  
23 video collection, ballistics collection, when there are still  
24 going to be witnesses at the trial that are the crime-scene or  
25 evidence-collection folks that they can cross-examine. It's

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1 just a huge number of witnesses. And we haven't come to an  
2 agreement yet on those stipulations. And so as a result we're  
3 concerned about how long the trial is going to take. And we  
4 know that we represented to your Honor repeatedly at this point  
5 that we're expecting about a three-week trial. We don't know  
6 what your Honor's schedule is thereafter. So we are trying to  
7 keep things moving and as tight as possible.

8 So at this point, because we haven't managed to reach  
9 agreement on those sort of high-volume, high-witness-number  
10 stipulations, we don't feel comfortable giving up an entire  
11 trial day.

12 What I would suggest to your Honor, if you're inclined  
13 to grant this brief adjournment, is, we're continuing to work  
14 in good faith on this. They're continuing to work in good  
15 faith on this. And I'm hoping that over the next week or so,  
16 we can make good progress and then be in a position where we  
17 can just not object.

18 MR. DONALDSON: I'll just say one thing to that, and,  
19 again, I know it's my request because of a trip that I had  
20 taken care of about nine, ten months ago, but I will say that  
21 the government has provided us stipulations. We have executed  
22 about nine, eight or nine of them, of the 12 that they're  
23 asking for, or 13 they're asking for. So that would be roughly  
24 about 75 percent, something like that, that we've agreed to.  
25 And we said that we would be inclined to make a few more. So,

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1 respectfully, to the extent that I respect her here, but I  
2 don't want to feel like I'm in a position, being put in a  
3 position that, if you sign these, then we'll say yes, which is  
4 what it feels like, because then that would maybe make me say  
5 I'm not signing anything just to do that. But we're not going  
6 to play those kind of games.

7 So I am saying, and then I'll sit down, that we have,  
8 I think, like I always am, trying to expedite, move efficiently  
9 and do things the right way. We have been signing these  
10 stipulations, have been working them out. And I hope to  
11 continue doing that. That's not going to happen. I get it.  
12 It's an adversarial proceeding, process, and we're going to be  
13 adversaries. I don't mind that. We'll be friends after that.  
14 But just so the record is clear, we have been working, at least  
15 I have, and I think Mr. Schmidt has as well, in good faith to  
16 get those stipulations done, with the understanding we're  
17 trying to agree to things that are agreeable and things that we  
18 disagree with we could disagree with, because we're disagreeing  
19 for the right reasons.

20 So I'll leave it at that. I'll leave the Court to  
21 decide whether to move it to February 4th. If the Court does  
22 not make arrangements, it won't be the end of the world. If  
23 the Court does, thank you very much.

24 THE COURT: Mrs. Fender.

25 MS. FENDER: Very brief, your Honor. I agree with

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1 everything Mr. Donaldson says about working in good faith.  
2 There's no doubt about that here. My particular point is that  
3 we highlighted and have highlighted, quite early on, that there  
4 are a number -- that these last three or four stipulations that  
5 we're talking about here are the ones that have a significant  
6 volume of witnesses. We simply want your Honor to know that  
7 we're all doing our best. We're not trying to hold anyone's  
8 feet over the fire here, but given that we have said three  
9 weeks, three weeks, three weeks, we're concerned that if we  
10 don't make progress on these other stipulations, we may go  
11 over.

12 So frankly, your Honor, depending on your schedule and  
13 other considerations for the Court, maybe that's not an issue,  
14 and so fine. But we just want to be sure that we're being  
15 clear to manage expectations here.

16 MR. SCHMIDT: Judge, may I add one thing?

17 THE COURT: Yes, Mr. Schmidt.

18 MR. SCHMIDT: One of the stipulations involved the  
19 Facebook accounts. The reason we can't enter into that  
20 stipulation yet is because of the protective order that does  
21 not allow us to discuss with our client whose Facebook accounts  
22 they are. So that decision, of entering into that  
23 stipulation -- the stipulation involving the Facebook  
24 accounts -- has to await until the date that we're allowed to  
25 talk to our clients about whose Facebook accounts they are.

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1           So that one would likely be resolved but is being  
2 delayed because of the circumstances of the protective order.  
3 So I want your Honor to be clear on that one, which I think the  
4 government thinks is one of the more difficult ones.

5           MS. FENDER: Your Honor, I certainly don't want to  
6 pull you into the back-and-forth on this and so I'll cut it off  
7 after this, but that's actually not one of the issues and  
8 actually we understood we had reached an agreement. And the  
9 objection to showing the clients because they think it's  
10 covered by the protective order, that's the first I'm hearing  
11 of that objection. The stipulation that Mr. Schmidt is talking  
12 about actually lists every single Facebook account we got for  
13 anybody related to the case, whether they're a witness,  
14 cooperating witness, defendant, or other.

15           So in any event, we're continuing to work, but my  
16 point is just, there's a reason why we're objecting. We're not  
17 trying to be difficult for the sake of being difficult  
18 genuinely. And again, based on your Honor's schedule, maybe  
19 there's no issue with delaying the trial by a day and you're  
20 confident that if we bleed into a fourth week that's fine, then  
21 there's no -- certainly that should go into your Honor's  
22 consideration.

23           THE COURT: A couple of observations. One is that the  
24 first trial date ordinarily is devoted to jury selection. So  
25 there's no substantive issue there concerning any testimony.

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1           Second, this Court, the parties may or may not be  
2 aware, has a practice of conducting full-day trials, starting  
3 at 9 and usually going until 5. That sometimes, compared to  
4 the practice in other courts, could add as much as two hours  
5 per day of trial time.

6           Third, in a case where we start losing time from the  
7 estimated duration, it has been my practice to add overtime as  
8 necessary so that on some days we could end at 5:30 or 6 or  
9 start at 8:30 in the morning, and that way, by the end of the  
10 trial, we will effectively have made up whatever time we may  
11 lose.

12           So I think, by these means, I would not be concerned  
13 about losing the one day at the start, with the understanding  
14 of all parties that we're going to make it up.

15           MS. FENDER: With that understanding, your Honor, then  
16 we'll withdraw our objection.

17           THE COURT: All right. In that case, we will agree  
18 that the trial will start one day later, on February 4th. And  
19 we will keep close tabs on the proceeding as it progresses.

20           And I first thank you for the cooperation that you've  
21 exhibited today in moving matters along. We can gain many  
22 hours of additional time if the parties continue that spirit of  
23 cooperation and enter into stipulations that would save our  
24 having to listen to witnesses unnecessarily. All right?

25           MS. FENDER: Your Honor, given that we moved the trial

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1 day, I suppose I need to exclude time to February 4th.

2 THE COURT: All right.

3 MR. DONALDSON: I of course will not be objecting to  
4 that.

5 THE COURT: All right. In that case, on the  
6 government's motion to adjourn time from speedy trial  
7 calculations until the commencement of trial on February 4th,  
8 no objections recorded by defendants, the motion is granted. I  
9 find that the reasons conveyed to the Court warrant this  
10 exclusion of time, as it is intended to ensure the  
11 effectiveness of counsel and prevent any miscarriage of  
12 justice. The Court is satisfied that the ends of justice  
13 served by the granting of this continuance outweigh the best  
14 interests of the public and defendant's in a speedy trial.

15 This order of exclusion of time is entered pursuant to  
16 the provisions of the speedy trial Title 18 U.S.C. §§  
17 3161(h)(7)(B)(2) and (4.)

18 Have a good day. Thank you.

19 MS. FENDER: Thank you, your Honor, as well.

20 (Adjourned)  
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24  
25